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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 272

MRS. JESSE MILES ET AL., PETITIONERS;

VS.

ILLINOIS CENTRAL RAILROAD COMPANY, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE AND THE SUPREME COURT OF TENNESSEE, AND BRIEF IN SUPPORT THEREOF.

WILLIAM G. CAVETT,
Memphis, Tennessee,
Attorney for Petitioner.

HAL S. BUCHANAN,
Memphis, Tennessee,
ROBERT A. HARRIS and
LOUIS E. MILLER,
St. Louis, Missouri,
Of Counsel.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE AND THE SUPREME COURT OF TENNESSEE, AND BRIEF IN SUPPORT THEREOF.

PETITION.

Petitioners pray this court to review on writ of certiorari a judgment of the Court of Appeals of Tennessee and the Supreme Court of Tennessee, in the case there entitled *Illinois Central Railroad Co.* v. *Mrs. Jesse Miles, Administratrix, et al.*

A final judgment of the Supreme Court of Tennessee was rendered on February 14th, 1941, when a petition for a rehearing was denied (R.____). And the opinion of the court of appeals and of the Supreme Court were written opinions and findings and appear in the record (R.____), but are not yet published.

The judgment of the trial court of Shelby County, Tennessee, sustained the demurrer and the merits of the case in favor of Mrs. Miles and her two daughters, and upon appeal by the Illinois Central Railroad Company from that judgment to the Court of Appeals of Tennessee. That court on _____, 1940, sustained the *one assignment of error* made by the railroad company which did not challenge the action of the court in sustaining the demurrers but merely claimed that the evidence showed a hardship, injustice and unnecessary burden would result to the defendant in permitting the lawsuit in Missouri to be prosecuted (R.____). The petition was promptly filed before the Supreme Court of Tennessee for certiorari and four assignments of error were presented to that court in said petition for certiorari (R.____). The Supreme Court denied certiorari but, by its opinion, it practically *adopted everything* that was held by the court of appeals as its opinion. The procedure under Tennessee statutes is that where a certiorari is denied by the Supreme Court, the record goes back and is lodged in the court of appeals, but in this case the record seems to have been lodged with the clerk of the Supreme Court. The clerk of the Supreme Court and the clerk of the Court of Appeals for the Western Division of Tennessee is the same person, J. E. Springbett (22 Tenn. App. Rep. 5, 175 Tenn. 6). The clerk of the Supreme Court certified this record and evidently this record is lodged in the Supreme Court of Tennessee. However, petitioners pray for certiorari to both courts so a technicality could not successfully be interposed that might defeat justice.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Paul H. Miles was employed by the Illinois Central Railroad Company as an inspector of cars at Memphis, Tennessee, and while he was engaged at his post of duty and inspecting cars engaged in interstate commerce on June 5, 1938, he was negligently and wrongfully killed by the operation of an Illinois Central Railroad Company's train.

Mrs. Jesse Miles was appointed by the Probate Court of Shelby County, Tennessee, administratrix of her deceased husband's estate. She brought suit in the law court of St. Louis, Missouri, for $45,000 damages claiming that Paul H. Miles was engaged in interstate commerce at the time of his injuries and she was entitled to recover under the Federal Employers' Liability Act. This injunction suit was filed in the Chancery Court of Shelby County, Tennessee, seeking an injunction against Mrs. Miles as administratrix, enjoining her from prosecuting her suit in the state court of Missouri upon the alleged grounds it would be inconvenient, expensive and a burden on interstate commerce. And the bill filed by the railroad *admitted under oath* that Paul H. Miles *was engaged at the time of his injury in interstate commerce.* Mrs. Miles was seeking to recover by reason of the Federal Employers' Liability Act.

The chancellor granted a temporary injunction, feeling that he was bound by the case of *Louisville, N. R. Co. v. Ragon*, 172 Tenn. 539. Mrs. Jesse Miles dismissed the lawsuit she had filed in St. Louis, Missouri, and surrendered her letters of administration in the Probate Court in Shelby County, Tennessee. Later she gave power of attorney to Robert R. Adams of St. Louis, Missouri, to be appointed administrator of her deceased husband Paul H. Miles's estate, and Robert R. Adams was duly appointed and qualified as such administrator, under the Missouri

laws, and then and there filed suit for damage against the Illinois Central Railroad Company for the wrongful and negligent killing of Paul H. Miles while he was engaged in interstate commerce, and the suit sought to recover $45,000 as damages under the Federal Employers' Liability Act (R.___), and the Illinois Central Railroad Company filed what it called an amended and supplemental bill against Mrs. Jesse Miles and her two daughters, enjoining and prohibiting them from testifying or lending any aid or taking any part whatsoever in this suit filed by Robert R. Adams, administrator, in the law court of St. Louis, Missouri.

Chancellor Bejach overruled the demurrer but exercised discretion and granted Mrs. Miles an appeal to the Supreme Court of Tennessee and that court, on July 1, 1939, distinguished the Ragon case, and while it overruled the demurrer the Supreme Court reviewed and remanded the case for the lower court to ascertain whether or not the defendant railroad was doing business in Missouri when sued and held:

> "If it develops that complainant is doing business within the State of Missouri in the sense of the Federal Employers' Liability Act, we are hesitant to award the injunction therein sought, although we do not foreclose that question until all of the facts are before us."
>
> 174 Tenn. 685.

Upon a remand of the cause to the Chancery Court of Shelby County, Tennessee, Mrs. Jesse Miles and her two daughters filed an extensive answer, and relied upon the demurrer as expressly held by the Supreme Court in this language:

> "For the reasons thus indicated, we are not willing to dispose of this case on demurrer but prefer an answer developing *all facts* as to the *nature of the complainant's business in Missouri.* * * * The decree of the chancellor is modified, the demurrer is over-

ruled *with leave to defendants to rely upon the same in their answer.*"

174 Tenn. 687.

Testimony was taken by the Illinois Central Railroad Company to sustain its contention that it would be necessary to take certain witnesses away from their Memphis yards and, etc., and that it would be expensive to transport them to St. Louis and would inconvenience the company and would be a burden upon interstate commerce.

The testimony of the chief auditor of the Illinois Central Railroad Company was taken by the defendants and, by his uncontradicted evidence, the Illinois Central Railroad Company did approximately a million and half dollar business per year in its St. Louis, Missouri, office, where sued, and that it operated numerous trains in that state and had numerous offices and employees in St. Louis, Missouri, where sued.

The chancellor, upon hearing the case upon the demurrer and upon the merits, sustained the demurrer and the merits of the case in favor of the defendants, dissolved the injunction and dismissed the bill.

The court of appeals, upon hearing the appeal upon one assignment of error, only reversed the action of the trial court and made the temporary injunction perpetual. Mrs. Miles made a motion in the court of appeals that cause be transferred to Supreme Court, as court of appeals had no jurisdiction. This question was not answered by the court of appeals in any written memorandum (R.____).

An extensive petition for certiorari was filed with the Supreme Court of Tennessee, first raising the question that the court of appeals had no jurisdiction as the case was decided below, upon demurrer, as well as upon its merits and the legislative act of Tennessee that created the court of appeals (Sec. 10618, Code of Tenn., 1932), expressly gave no jurisdiction to the court of appeals to pass on questions raised by a demurrer, and this was pre-

sented to the Supreme Court in the first assignment of error, and the other three assignments of error extensively raised all federal questions that were raised in the demurrer as well as in the answer.

The Supreme Court of Tennessee kept the case under advisement for a great length of time and finally denied certiorari (Jan. 10, 1941). A petition for rehearing was promptly filed and that was denied Feb. 17, 1941, and this petition is filed within the time provided in order of this court by Mr. Justice Roberts May 14, 1941.

JURISDICTION OF THIS COURT.

Jurisdiction of this court is based upon Sec. 237 of the Judicial Code, as amended by the Act of Feb. 13, 1925, 43 Stat. 937, 28 U. S. C. A. 344 (*Pittman* v. *Home Owners Loan Corp.*, 308 U. S. 21), authorizing petitions for writs of certiorari to be prayed for and issued to higher courts of various states where "a title, right, privilege or immunity is set forth or claimed under a statute of United States." In this case, a *privilege, right*, and *an immunity* was set forth in the extensive *demurrer* and in the *answer*, and were *both sustained* by the chancellor but were both erroneously reversed by the court of appeals and the Supreme Court of Tennessee. The Supreme Court of Tennessee is the "highest court of that state" as set forth in Art. VI, Sec. 1, of the Const. of Tenn. of 1870.

SPECIFICATION OF ERRORS OR THE QUESTIONS PRESENTED.

Your petitioner submits that the court of appeals and the Supreme Court of Tennessee were each in error in the following respects:

1. The court of appeals and the Supreme Court of Tennessee erred in reversing the trial court or chancellor's decision, which sustained the demurrer and the merits of the case in favor of Mrs. Miles and her two daughters, and both of said appellate courts of Tennessee failed or refused to follow the language of the Federal Employers' Liability Act (28 U. S. C. A. 56) and said courts failed or refused to follow the interpretation or construction of said statute given by the federal courts and which construction and interpretation of said statute became and is a part of said statute, and said Tennessee courts applied inapplicable state rules of decision or interpretation instead of that of the federal courts.

2. The court of appeals and the Supreme Court of Tennessee erred in enjoining permanently Mrs. Jesse Miles and her two daughters from testifying or aiding in any way whatsoever the prosecution of the suit instituted by R. R. Adams, administrator, in the law court of St. Louis, Missouri, which suit sought a recovery of damages for the wrongful and unlawful death of Paul H. Miles while he was employed by the Illinois Central Railroad Company and was then and there engaged in interstate commerce, and which cause of action was governed by the Federal Employers' Liability Act. And said courts should have followed the federal law and the interpretation of same by federal courts because whenever the rights or situation of parties are chiefly defined and established by law, equity has no power to change or unsettle those rights or that situation but in all such instances the maxim, *aequitas sequitur legem* (equity follows the law), is strictly applicable.

3. The court of appeals and the Supreme Court of Tennessee erred in reversing the trial court and in granting an injunction against Mrs. Miles and her two daughters as set forth in said injunction because

> The Federal Employers' Liability Act expressly conferred upon the defendants in this suit the right to bring her action for damage or compensation in the court in which she brought it.

And it cannot be assumed that the Congress of the United States, in allowing such action to be brought in the district in which the defendant shall be found doing business at the time of commencement of such action, did not have in mind the inconvenience and expenses that would result in almost, if not quite, every case, from bringing suit elsewhere than at the place where the cause of action arose.

Congress could have provided that actions under the Federal Employers' Liability Act should have been brought at the place where the same would not constitute a burden on commerce, inconvenience and expenses to the railroad company, but Congress has the power to regulate interstate commerce and may when it sees fit place incidental burdens thereon by jurisdictional statutes, and the remedy, if any, is legislative and not judicial. Even though such a suit may be a burden, but oppressive and unreasonable, it is not. If the Tennessee Court of Appeals and the Supreme Court's opinion in this Miles case is to stand, the federal court's construction and interpretation of this federal right under this federal statute must fall.

4. The court of appeals and the Supreme Court of Tennessee erred in reversing the trial court because there was no equity on the face of the complainant's (Illinois Central Railroad Company's) bill. This was the eighth ground of the demurrer which was sustained by the trial court and reversed by two appellate courts.

REASONS RELIED ON FOR GRANTING THE WRIT.

(1) It is submitted that this court should entertain jurisdiction for the following reasons: (1) The question is of importance as evidenced by the numerous reported decisions in the federal and state courts, bearing more or less upon the questions involved.

The decision and opinion of the court of appeals and the Supreme Court in this Miles case is in *direct conflict* with the *federal cases construing this federal statute.*

1. *C. & O. R. Co.* v. *Vigor, Admr.*, (6 C. C. A.) 17 Fed. Supp. 602, affg. 90 F. 2d 7, c. d. 58 S. Ct. 26, 302 U. S. 705, 82 L. Ed. 545.
2. *Taylor* v. *A., T. & S. F. R. Co.*, 292 Ill. App. 457, 11 N. E. 2d 610, c. d. 58 S. Ct. 842, 82 L. Ed. 528.
3. *Radet* v. *B. & O. R. Co.*, 108 F. 2d 580, c. d. April 1, 1940, 309 U. S. 682.
4. *B. & O. R. Co.* v. *Kepner*, 137 O. St. 409, c. d. April 14, 1941, ___ S. Ct. ___, 85 L. Ed. 750.
5. *So. R. Co.* v. *Cochran, Judge*, (6 C. C. A.) 56 F. 2d 1019.
6. *Trapp* v. *B. & O. R. R. Co.*, 283 Fed. 655.
7. *Connelly* v. *Central R. R. Co.*, (N. J.) 238 Fed. 932.
8. *Norris* v. *I. C. R. Co.*, 18 F. 2d 584.
9. *Schendel* v. *McGee, Judge*, 300 Fed. (8 C. C. A.) 273, also, 292 Fed. 326.
10. *Wood* v. *Delaware R. R. Corp.*, (2 C. C. A.) 63 F. 2d 235.
11. *So. Ry. Co.* v. *Painter, Admr.*, 117 F. 2d 100.

The Tennessee appellate courts, recognizing that it was their duty to follow the *federal court's construction and interpretation* of federal statutes, committed monumental errors by citing and following *dicta* in *Cran-*

dell v. *Hebbe*, 53 F. 2d 739; and *B. & O. R. Co.* v. *Bole*, 31 Fed. Supp. 221, and not following the above 11 decisions correctly interpretating and construing this federal right.

In the *last case*, the district judge Baker did not have *any lights* before him except the *railroad company's brief*. In a subsequent case, *B. & O. R. Co.* v. *Jesse C. Clemm and Henry G. Shores*, on January 15, 1941, he *overruled* the opinion in the Bole case and *refused* to follow the opinion that he had formerly followed, the *Ex parte Crandall*, 53 F. 2d 969, case (37 Fed. Supp. ——) Copy filed in No. 678, October Term, Sup. Ct., 1940, *B. & O. R. Co.* v. *Kepner*) because that case did not apply and first first opinion was based upon dicta and error and not determinative questions in that case.

Judge Evans, in that case, in 52 F. 2d 653, while using a lot of dicta in his opinion, reached a correct decision by holding:

> "Its judgment (Indiana trial court's) is reviewable by appeal to Indiana courts, but is not reviewable by this court through an application for a writ of habeas corpus."

The Seventh Circuit Court of Appeals, in this case (53 F. 2d 73), after using a lot of dicta, like Judge Evans did, determined the question correctly, as follows:

> "The Vandenberg County Probate Court appearing to have *jurisdiction over the subject matter* wherein its *temporary injunction* was granted, the federal court by habeas corpus or otherwise are *without power to pass upon* the *wisdom, justice,* or *legality* of its action."

A writ of habeas corpus cannot be used for a writ of error or appeal.

It has been settled by thirteen decisions of the Supreme Court of the United States that a writ of habeas corpus can not be used as an appeal, or writ of error, and held:

"In the regular and ordinary course of procedure, the power of the highest state court in respect of such question should first be exhausted."

U. S. ex rel. Kennedy v. *Tyler*, 269 U. S. 13, 70 L. Ed. 138, 144, and cases cited.

It has been settled that:

"The rule is well settled that a restraining order or *interlocutory injunction* issued by a *court of competent jurisdiction* must be obeyed even if erroneous and based upon an invalid statute, *until it be set aside by orderly review.*"

Howat v. *Kansas*, 258 U. S. 181, 66 L. Ed. 550.
McLeod v. *Majors*, 102 F. 2d (5 C. C. A.) 128.

Tennessee courts, therefore, have erroneously applied and misconstrued what federal courts held on the *determinative questions* in this Miles case and have failed or refused to properly apply the true federal court's *interpretations and constructions of this valid act of Congress.*

(2) The Tennessee appellate courts in this Miles case while expressing doubt, dicta, by saying and holding that a state court might not enjoin a suit filed under the Federal Employers' Liability Act *in a federal court* that such reason and rule *would not apply to enjoining such an action in a state court.* This is reasoning in a circle and was not sound logic nor law and conflicts with the act of Congress because this federal right was created and given life and came from the same *womb of creation* —Congress. Congress had power under Art. I, Sec. 8, Subsec. 4, of U. S. Const.,

"To regulate commerce * * * among the several states,"

and having created the federal right and *venue jurisdictional statute* this *implies a power to preserve this right.* The power to create *implies the power to preserve.* Art. I, Sec. 8, Subsec. 19, of U. S. Const., has always provided that Congress had power

"To make all laws which shall be necessary and proper for carrying into execution the *foregoing powers.*"

Art. VI of U. S. Const. has always provided:

"This Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land; and the *judges in every State shall be bound thereby,* anything in the Constitution or *laws of any State* to the contrary notwithstanding."

The Fourteenth Amendment of the United States Constitution provides a prohibition against states as follows:

"No State shall make or inforce any law which shall abridge the privileges or immunities of the citizens of the United States nor deny to any person the equal protection of the laws."

This was pointed out to the trial court, the court of appeals, and to the Supreme Court of Tennessee in the *demurrer,* and in the *answer* of Mrs. Miles and her daughters, and in *assignments of error.*

The Federal Employers' Liability Act, as amended April 5, 1910, provided:

"Under this act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing of such action.

"The jurisdiction of the courts of United States under this act *shall* be concurrent with that of the *courts of the several states,* and *no case arising under this act* and brought in *any state court of competent jurisdiction* shall be *removed* to any court of the United States" (45 U. S. C. A. 56).

This, and the constitutional provisions quoted above, placed a *mandatory duty upon state courts* the same as

upon federal courts to entertain and try cases arising under this act of Congress, and an injunction against this is unlawful.

"The jugular vein" or "the hub of the case" in this act gave the injured employee an *absolute right* to institute and *maintain* his suit *in a state court of competent jurisdiction. Mondou* v. *New York, N. H. & H. R. Co.*, 223 U. S. 1, 56 L. Ed. 327, reversing the Supreme Court of Connecticut which declined jurisdiction in the state courts and see *McKnett* v. *St. L. & S. F. R. R.*, 292 U. S. 230. In the Mondou case the Supreme Court said:

> "The power to create implies the power to preserve.
>
> "The government of the Union, though limited in its powers is supreme within its sphere of action.
>
> * * *
>
> "It is the government of all; its powers are delegated by all; it represents all, and acts for all (see Art. VI, U. S. Const.).
>
> "When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for *all the people* and *all the states* and thereby established a *policy for all*.
>
> "We conclude that *rights arising* under the act in question (Federal Employers' Liability Act) may be enforced, *as of right*, in the *courts of the states* where their jurisdiction, as prescribed by local law, *is adequate* to the occasion."

We next follow this question no further because the matter is *stare decisis* in Missouri, *where the Miles case was instituted. State ex rel. Foraker* v. *Hoffman, Judge*, 309 Mo. 625, 274 S. W. 362, reversing Judge Hoffman who declined jurisdiction under the Federal Employers' Liability Act, and the Supreme Court of the United States, affirmed 274 U. S. 24, 47 S. Ct. 20, 71 L. Ed. 905. And as both, the Missouri Supreme Court and the Supreme Court of United States *have settled* as to Missouri state courts *this question*, it is not an *open*

question for any other court in the United States, and especially not an open question for the Tennessee appellate courts in this case.

It was urged by great lawyers that *state courts could not exercise* the jurisdiction under this Federal Employers' Liability Act, *as well as federal courts,* but the Supreme Court answered this argument and held that the *state courts had no discretion* to deny jurisdiction and said:

> "We are not disposed to believe that the exercise of jurisdiction by state courts will be attended by any appreciable inconvenience or confusion; but be that as it may, it affords no reason for *declining* a *jurisdiction conferred by law.*"
>
> 223 U. S. 58.

(3) The Tennessee appellate courts committed a material error and *deprived* Mrs. Miles and her daughters of this *material, substantial,* and *important federal right* granted by the act of Congress, and Mrs. Miles and her daughters exercising this federal and constitutional right had the right to choose their own court, the state courts of Missouri which state laws constitutionally provide for a verdict in these Federal Employers' Liability cases by *nine jurors* instead of *twelve as required by Tennessee law* and as required in the federal courts. The Sixth Circuit Court of Appeals, in deciding this question, interpretated or construed this federal act as giving the *choice of the court to the plaintiff* and said:

> "The manifest purpose was to yield to the suitors under it the choice of tribunal as between the courts of the United States and the *several states.*"
>
> *Teel, Admr.,* v. *C. & O. R. Co.,* 204 Fed. 917, 47 L. R. A. (N. S.) 23.

The Supreme Court of the United States, interpretating and construing their *venue jurisdictional statute,* held that the *choice of the courts was with the plaintiff* and that the *plaintiff had a right to select a state court* where

the *jury's verdict was valid by nine or ten jurors* and that this *remedial statutory right belongs to the plaintiff*, and the court said:

> "The grant of concurrent jurisdiction implies that in the first instance *the plaintiff shall have the choice of the court.* As an incident, he is entitled to whatever *remedial advantage inheres* in *that particular forum. M. & St. L. R. Co.* v. *Bombolis*, 241 U. S. 211, 60 L. Ed. 961."
>
> *Mo. ex rel. R. R. Co.* v. *Taylor*, 266 U. S. 200, 45 S. Ct. 47, 69 L. Ed. 247, 42 A. L. R. 1232, 1235.

Tennessee appellate courts have decreed this right to the Illinois Central Railroad Company.

The trial court in this Miles case followed this construction and interpretation of this federal statute by the Sixth Circuit Court of Appeals and by the Supreme Court of the United States, but the court of appeals and the Supreme Court of Tennessee declined to do that, and what the Sixth Circuit Court of Appeals and the Supreme Court of United States interprets this act to mean, and what rights it gives must either stand or the Tennessee appellate courts, which takes away these rights, must stand, and the federal court's interpretations must fall.

(4) The federal courts *construing and interpretating this act of Congress* had long signboarded the highway of travel for litigants that the courts, though it was *expensive, inconvenient,* and *burdensome* and *burdensome upon interstate commerce, had no discretion to deny the litigant of this federal right to bring and maintain his or her suit* under the Federal Employers' Liability Act, *in any court having jurisdiction over the defendant.* (1) *Dimmit Hoffman* v. *Mo. ex rel. Foraker, Admr.*, 309 Mo. 625, 274 U. S. 20, 71 L. Ed. 906. (2) The Eighth Circuit Court in *Schendel* v. *McGee*, 300 Fed. 273, interpretating and construing this act held:

"Congress has not given the courts the right to exercise discretion as to whether the case shall be prosecuted, or such prosecutions refused, because the same may be a burden on commerce."

(3) *C. & O. R. Co.* v. *Vigor, Admr.*, 90 Fed. 7, c. d. 58 S. Ct. 26, 302 U. S. 705, 82 L. Ed. 545, held:

"We held in *So. Ry. Co.* v. *Cochran*, 56 F. 2d 1018, that the filing of a suit in such a jurisdiction, even though it was inconvenient was not enough to *justify a court of equity* in enjoining its prosecution in the *face* of the *statute giving the right to bring the action in that jurisdiction.*"

In the Cochran case, the court said:

"Has the defendant (A. M. Cochran, D. C.) *any discretion* to refuse (for equitable reasons) to exercise it (jurisdiction)? We think not."

So. Ry. Co. v. *Cochran, J.*, 56 F. 2d 1019, 1020.

Thirty years ago, the Supreme Court in *Mondou* v. *New York, N. H. & H. R. Co.*, 223 U. S. 1, held that the Connecticut court having general jurisdiction could not *exercise a discretion* and refuse the litigant the federal right to try his case in the state courts of Connecticut.

It is true that some state courts which have made human errors have misconstrued the *Douglass Case*, 279 U. S. 377, 73 L. Ed. 372, in which the chief justice, Mr. Justice Van Deventer, and Mr. Justice Butler dissented, but that case is easily understood when the language is carefully and scholarly read which says:

"It may very well be that if the Supreme Court of New York were given *no discretion*, being *otherwise competent*, it would be *subject to a duty.*"

Mondou v. *New York, N. H. & H. R. Co.*, 223 U. S. 1, 56 L. Ed. 327, 348, 349, 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169, N. C. C. A. 875.

And since the *McKnett Case*, 292 U. S. 230, and the *Hoffman Case*, 274 U. S. 20, can there be any doubt as to *duty of state courts?* In this Miles case we are not concerned with *any particular state statute* of New York or some of the other forty-eight states, but this suit involves only the state statute of Missouri and the act of Congress and that is fully adjudicated and settled in the Hoffman case as to Missouri courts. In the Hoffman case the question of the expenses of transportation of witnesses and inconvenience to the railroad was directly involved in the Missouri courts of general jurisdiction, and where the circuit judge, exercising his discretion in denying Foraker this federal right to select his own court and try his case in Missouri, was settled by both the Supreme Court of Missouri and the Supreme Court of United States unanimously, and regardless of the statute laws of New York or some other state statute, the matter is *stare decisis* in Missouri on these federal employers' liability cases. Tennessee appellate courts in this Miles case conflict with this well-settled construction of this federal right.

(5) The court of appeals and the Supreme Court of Tennessee committed error by holding that the state courts had "inherent equitable jurisdiction to enjoin Mrs. Miles and her daughters from aiding or taking any part in the Missouri suit *to enforce this federal right.*" And, if the state courts of Tennessee can cut off, pare down, and *destroy this federal right* given by this act of Congress then, indeed, the Tennessee equity courts can set themselves up czaristically or dictatorially, and the Tennessee courts' idea is supreme to the federal courts' construction of this federal statute and the act of Congress, which was constitutionally created. While the court of appeals and the Supreme Court of Tennessee were *bound by the pleading* of the Illinois Central Railroad Company in its sworn bill and which *contention was accepted* by it, and correctly set forth, in 1939, in *Ill. Cent. R. R. Co.* v. *Miles*, 174 Tenn. 676, where the court concretely set

forth all that was charged in the bill that would *tend* to warrant a court of equity in granting an injunction as follows:

> "It was further alleged that a defense of the suit brought by the administratrix as aforesaid would necessitate the transportation of many witnesses from Memphis to St. Louis, that numbers of these witnesses were employees of complainant railroad company, that it could not compel the attendance of necessary witnesses at a trial in St. Louis, and that the transportation of its employees to testify at St. Louis would disrupt its service, and that a trial of this case at St. Louis would put the *complainant to great inconvenience and expense and would be an undue burden on interstate commerce.*"

The pleadings were never changed and this case was litigated before the Supreme Court in 1939, and before the trial court in 1940, upon the idea that to permit this suit to be prosecuted in St. Louis, Missouri, would cause "great inconvenience, expenses, and would be an undue burden *on interstate commerce.*"

But when the case reached the court of appeals, the railroad company made only one assignment of error that the evidence showed that the prosecution of the suit in Missouri "would result in hardship, oppressive injustice, unnecessary and an unconscionable burden on the defendant.

Notwithstanding the well-settled and unanswerable rule of law throughout the United States, as well as in Tennessee, that a *litigant can not switch its contention and position* in litigation like a squirrel can jump from tree to tree, or limb to limb; Tennessee appellate courts permitted this. Certainly the probata could go no further than the *allegata* and the Tennessee courts' opinion and conclusion and result of their decision and decree *are in conflict with three former decisions of this court*, which have settled that question contrary to that which the Tennessee courts have held, and this court's language and decision is as follows:

"As a practical matter, courts could not undertake to ascertain in advance of trial the number and importance of probable witnesses within and without the state and retain or refuse jurisdiction, according to the relative inconvenience of the parties."

1. *Hoffman* v. *Mo.*, 274 U. S. 21, 71 L. Ed. 907.
2. *D. & R. G. R. R. et al.* v. *Terte*, 284 U. S. 287, 76 L. Ed. 295.
3. *National Milling Company* v. *Columbia Milling Company*, 292 U. S. 511, 54 S. Ct. 797, 78 L. Ed. 1396, a unanimous opinion by Mr. Justice Cardozo.

In the National Milling Company case, the court unanimously disposed of the question as follows:

"Such a suit *may be a burden*, but *oppressive* and *unreasonable, it is not.*"
292 U. S. 511.

The Hoffman case and the Terte case involved the Federal Employers' Liability Act. The Tennessee appellate courts in the Miles case fail or refuse to follow this construction and law.

(6) The *identical question* (in Federal Employers' Liability Act cases) was before the sixth circuit in *So. R. R. Co.* v. *Cochran*, 56 F. 2d 1019, and in the later case, *C. & O. R. Co.* v. *Vigor, Administrator*, 90 F. 2d 7, c. d. 302 U. S. 705. Yet the appellate courts of Tennessee would not follow this federal statute and federal court construction of same as it was their duty to do.

Kloeb v. *Armour & Co.*, (Dec. 9, 1940) 85 L. Ed. 156.

The federal courts follow the state courts' *construction and interpretation of state statutes*. *West et al.* v. *Am. Tel. & Tel. Co.*, (Dec. 9, 1940) 85 L. Ed. 147. *Six Companies of Cal. et al.* v. *Joint Highway Dist.*, 85 L. Ed. 159, 61 S. Ct. ____, 85 L. Ed. ____; *Fidelity Union Trust Co.* v. *Field*, 61 S. Ct. ____, 85 L. Ed. 170. The rights growing out of this federal statute to Mrs. Miles and her

daughters *in nowise concern state statutes of Tennessee* and if, as the court of appeals and the Supreme Court have held, that the Tennessee courts have inherent equity jurisdiction, still they can not *cut off, pare down* and *destroy* this federal right given by the act of Congress and, if such state rules of equity conflict with the federal right given to Mrs. Miles, the state rules of equity must yield and the laws made in pursuance of United States Constitution are supreme laws of the land and must be obeyed even though the court of appeals and the Supreme Court of Tennessee think otherwise. Yet they have not done so in this case. This Federal Employers' Liability Act of Congress not only *creates* these federal rights to Mrs. Miles and her daughters, but the act also provides the *manner of its enforcement.* In other words, the *liability* and *remedy* were created by the *same statute of Congress* under constitutional authority, and the *remedy there created must be preserved*, otherwise, Tennessee appellate courts can substitute their idea for that of Congress. *Pollard* v. *Bailey*, 87 U. S. 520, 22 L. Ed. 376; *Stewart, Admr.*, v. *B. & O. R. R. Co.*, 168 U. S. 445, 42 L. Ed. 537.

This was not recognized and applied *in this Miles case*, though, in another case, Tennessee courts did so apply the law, 175 Tenn. 314.

Under this act of Congress (45 U. S. C. A. 56), by the positive language of the act, suit could have been brought by Mrs. Miles "in the district of the residence of the defendant," in Illinois.

Then unquestionably it was the *intention of Congress* to permit such a suit as Mrs. Miles chose to institute in either state or federal court *in the district of the residence of the defendant*, which was Illinois. And, therefore, Mrs. Miles could have unquestionably brought and maintained her suit in the state courts of Illinois *at Chicago*, or in *East St. Louis, Illinois*, just across the river from St. Louis, Missouri, and unless both the positive language of the act and the expressed decision of the Supreme Court of the United States, *Hoffman* v. *Foraker*, 274 U. S. 44.

are to be absolutely disregarded. And if it would not have been inequitable to follow what the act provided and the clear decision of the Supreme Court, and in this Hoffman case, the same questions were involved as were in the Miles case, and the railroad contended that it had *eleven witnesses that had to be brought from Kansas* where the action occurred and *great inconvenience, hardship*, and a *burden on commerce*, would result. The circuit judge *accepted this contention* but the Supreme Court of Missouri and the Supreme Court of United States *reversed* Judge Hoffman.

Mrs. Miles had the statutory venue jurisdictional right to maintain this suit in East St. Louis, Missouri, in state or federal court. It would be a "distinction without a difference" to say that it would be inequitable for her to maintain the same suit across the river in St. Louis, Missouri, *where the defendant was found doing a million and a half dollars of business*, and especially since the act says that suit may be maintained in state or federal court "in the district in which the defendant is found doing business at the time of commencement of such action."

The federal court's construction of this federal statute must be the supreme law of the land (Art. VI of the U. S. Const.), which says that such action of Congress shall be the supreme law of the land, and that the judges in every state shall be bound there by anything in the constitution or law of any state to the contrary notwithstanding. And if Tennessee appellate courts in this Miles case are to be sustained, then indeed Article VI is rendered "sounding brass and tinkling cymbals." And this Constitution which we all have felt that we are treading on holy ground when we discuss it, is but "a scrap of paper."

(6) The Tennessee appellate courts have practically *destroyed* Mrs. Miles's *rights granted under this federal statute* because the federal statute (45 U. S. C. A. 56) placed a *two years' statute of limitations* upon the filing

of such suit and the absolute enjoining of the suit filed in Missouri *destroys this right* to bring a new suit. In *Swift & Co.* v. *Warehouse Co.*, 128 Tenn. 82, 102, the Supreme Court enjoined the Memphis Storage & Warehouse Company from relying on the *statute of limitations as a defense* to another suit to be filed. This was called to the attention of the Supreme Court of Tennessee, but it fell upon deaf ears.

The Supreme Court of Tennessee committed error in not finally determining by its opinion and by its decree the matters in litigation in 1938. *I. C. R. R. Co.* v. *Miles*, 174 Tenn. 676. Because the Tennessee court had neither power nor jurisdiction to decide whether or not the Missouri courts had jurisdiction over the Illinois Central Railroad Company. That was a *matter solely and exclusively for the Missouri court.*

And the Illinois Central Railroad Company, in its sworn bill, admitted that it did business in St. Louis, Missouri, but claimed that the business was *interstate business.* It had for many years been settled by two or more decisions of the Supreme Court of the United States that this was no grounds for denying jurisdiction, and the court held:

> "Even a foreign corporation is not immune from the ordinary process of the courts of the state where its business is entirely interstate in character. *International Harvester Co.* v. *Kentucky*, 234 U. S. 579, 58 L Ed. 1479, 34 S. Ct. 944.
>
> "It must submit, if there is jurisdiction, to the requirements of orderly, effective administration of justice, *although thereby interstate commerce is incidentally burdened.*"

Hoffman v. *Mo. ex rel. Foraker*, 274 U. S. 244. Yet the Supreme Court of Tennessee set itself to investigate, decree and determine *whether or not the Missouri court had jurisdiction in the Miles case*, though it was a *power* and a *matter* for the Missouri court *alone*. By the action

of the Supreme Court in not finally determining the case in 1938 or 1939, but remanding the case, and the delay that was had in the court of appeals and nearly or about nine or ten months in the Supreme Courts in disposing of the certiorari from the court of appeals was determined by the Supreme Court of Tennessee, *more than two years elapsed since Paul H. Miles was wrongfully and negligently killed* by the Illinois Central Railroad Company, and no Tennessee statute can set itself supreme and take the place of the act of Congress, *which limitation law is two years.*

When this matter was called to the attention of the Supreme Court of Tennessee both in the petition for certiorari and in the petition for rehearing, it was the most inequitable action on the part of the Supreme Court of Tennessee in not according to Mrs. Miles the same right that it had given the great packer, *Swift & Co.* v. *Warehouse Co.*, 128 Tenn. 102; yet Mrs. Miles, who has been litigated with by the powerful railroad, and with her resources exhausted, and her patience and her rights destroyed, was left for the two years' statute of limitations to be entered as a defense by the railroad company if another suit should be brought.

Your petitioner presents herewith as a part of this petition a certified copy of the transcript of the record in the court of appeals and the Supreme Court of Tennessee and presents its brief for consideration with this petition discussing the questions involved.

Wherefore, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this court directly to the court of appeals and to the Supreme Court of Tennessee commanding said courts to certify and send to this court on a day certain to be therein designated a full and complete transcript in said courts styled, "*The Illinois Central Railroad Company* v. *Mrs. Jesse Miles et al.*, to the end that said case may be reviewed and determined by this court and that the petitioner may

have such relief as this court may deem proper, lawful, and equitable, and that the opinion and judgment of both courts, the court of appeals and the Supreme Court of Tennessee, may be reversed and that the action of the chancellor may be affirmed.

Mrs. Jesse Miles,
By WILLIAM G. CAVETT,
Memphis, Tennessee,
Attorney for Mrs. Jesse Miles.

HAL S. BUCHANAN,
Memphis, Tennessee,
ROBERT A. HARRIS and
LOUIS E. MILLER,
St. Louis, Missouri,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1940.

No. _____.

MRS. JESSE MILES, PETITIONER,

VS.

ILLINOIS CENTRAL RAILROAD COMPANY,
DEFENDANT.

BRIEF IN SUPPORT OF PETITION.

This brief, in support of the petition for a writ of certiorari, seeks to reverse the judgment of the court of appeals, and Supreme Court of Tennessee, which granted an injunction restraining Mrs. Miles from testifying, aiding or taking any part whatever in the prosecution of the suit filed by R. R. Adams, administrator of the estate of Paul H. Miles, deceased, in the law court of St. Louis, Missouri, under the Federal Employers' Liability Act. The Tennessee courts based their action upon inapplicable law and failed or refused to follow the plain language of this federal law and the federal courts' interpretation and construction of said law, which have become a part of said statutory law.

STATEMENT OF CASE.

In interest of brevity Your Honors are respectfully referred to the petition for a writ of certiorari herein in which is recited a statement of facts, as well as statement of history of case. The statute involved is Section 6, Act, 1910 (45 U. S. C. A. 56).

SUMMARY OF ARGUMENT.

Federal Question.

The questions involved in this Miles case necessarily involve the interpretation and application of the United States Constitution, an act of Congress, and the federal courts' constructions of this act, and State of Tennessee law, as declared by its appellate courts, is inapplicable.

Florida Power & Light Co. v. *Miami*, 305 U. S. 644.

Pederson v. *McGraw*, 308 U. S. 313.

Stoll v. *Gottlieb*, 305 U. S. 165.

Carpenter v. *Shaw*, 280 U. S. 363.

Russell v. *Todd*, 309 U. S. 280.

Were Federal Questions Properly Raised?

Ground 8 of demurrer, which the Supreme Court of Tennessee held in 1939 could be relied upon in answer (174 Tenn. 687, l. c.) and which was relied upon in answer, and sustained by chancellor, pointed out that "there was no equity on the face of the bill," and this brought into view every question that can be raised by a demurrer.

C. & O. R. Co. v. *Vigor, Admr.*, 17 Fed. Supp. 602, 90 F. 2d 7, c. d. 302 U. S. 705, 58 S. Ct. 26, 82 L. Ed. 545.

Waugh v. *University*, 105 Miss. 623, 62 So. 827, L. R. A. (N. S.) 1915D, 588, 237 U. S. 589, 35 S. Ct. 720, 59 L. Ed. 1131.

Demurrer is proper pleading in Tennessee to question or challenge a bill in equity to enjoin a suit at law. Sec. 10387, Code of Tenn., *Gregory* v. *Merchants St. Bank*, 135 S. W. 2d 465, 23 Tenn. App. 573, c. d. S. Ct.; *American Express Co.* v. *Fox*, 135 Tenn. 489, 87 S. W. 117 Ann. Cas. 1918B, 1148. Can State Practice or Decissions Enlarge or Diminish and Destroy Federal Rights? State practice or decisions of federal rights growing out of acts of Congress, can not be enlarged or diminished by such names as state courts give to remedies or the distinction made between them by state practice.

Carpenter v. *Shaw*, 280 U. S. 363.

Stratton v. *St. Louis S. W. R. Co.*, 284 U. S. 530, 534.

Kloeb v. *Armour*, (Dec. 9th, 1940), 85 L. Ed. 156.

Tennessee Court of Appeals and Supreme Court say that they have an inherent equity jurisdiction to take from Mrs. Miles that which Congress has given her and the federal courts' construction or interpretation of this federal right, at least that is just what they did.

Federal Questions Were Raised Not Only in the Demurrer, But Answer at the Threshold of This Litigation, and the Evidence Was Not Conflicting, and the Supreme Court Can and Will Perform Its Proper Functions, and Protect These Federal Rights of Mrs. Miles.

Norris v. *Alabama*, 294 U. S. 587, 55 S. Ct. 579.

Chicago, M. & St. P. Ry. Co. v. *Coogan*, 271 U. S. 472, and cases cited.

Medrich v. *Lowenstein*, 232 U. S. 236.

Toledo, etc., R. Co. v. *Slavin*, 236 U. S. 545.

Stoll v. *Gottlieb*, 305 U. S. 165.

Great Northern R. Co. v. *Wash.*, 300 U. S. 154.

Consolidated Textile Corp. v. *Gregory*, 289 U. S. 85.

Hayne v. *Committee*, 307 U. S. 496.

Nickey v. *Miss.*, 292 U. S. 393.

Was It in the Power of Tennessee Courts to Decide Whether the Missouri Courts Had Jurisdiction?

It was admitted in the Illinois Central Railroad Company bill that it was doing an interstate business in St. Louis, Missouri (and by the chief auditor's uncontradicted testimony from the railroad's records), that it did a million and a half dollars per year business when sued and the validity of the process of the Missouri courts was a matter solely with that court and not Tennessee courts.

So. Pac. R. Co. v. *Klinge*, 55 F. 2d 85, c. d. 290 U. S. 657.

Int. Harv. Co. v. *Ky.*, 234 U. S. 579.

Hoffman v. *Mo. ex rel. Foraker*, 274 U. S. 44.

Tennessee courts should have finally determined the questions in 1939 and not prolonged this litigation nearly three years.

Did the Act of Congress Give the Choice of the Courts to Plaintiff or Railroads?

The Supreme Court has answered:

"The grant of concurrent jurisdiction implies that in the first instance the plaintiff shall have the choice of the court. As an incident, he is entitled to whatever remedial advantage inheres in that particular forum. *M. & St. L. R. Co.* v. *Bombolis*, 241 U. S. 211, 60 L. Ed. 961."

Mo. ex rel. R. Co. v. *Taylor*, 266 U. S. 200, 45 S. Ct. 47, 69 L. Ed. 247, 42 A. L. R. 1232.

The Tennessee courts took this "choice of courts" from the plaintiff, Mrs. Miles, and Santa Claused it to the Illinois Central Railroad Company, and they took this "remedial advantage" (a jury verdict right in Missouri of nine jurors) from Mrs. Miles and gave it to the Illinois Central Railroad Company of requiring 12 jury verdict in Tennessee. Is not this a diametrical conflict

between Tennessee courts' holding and that of Supreme Court of United States on this act of Congress?

Are Not the Rights of Mrs. Miles Fixed by the Act of Congress Whether Suit Is Begun and Maintained in a Federal or State Court? Do Not These Rights Come from the Same Womb of Creation?

The right to sue and maintain such suit under this Federal Employers' Liability Act in the federal court is no more legitimate than the right to sue and maintain such suit in a state court, otherwise Art. I, Sec. 8, Subsec. 19, and Art. VI, of U. S. Const., are "a mere scrap of paper."

State courts have held:

> "The Federal Employers' Liability Act expressly conferred upon the defendant in this suit the right to bring her action for damages or compensation in the court in which she brought it. * * * We cannot assume that the Congress of the United States in allowing such an action to be brought in the district in which the defendant shall be doing business at the time of the commencement of such action did not have in mind the inconvenience that would result in almost if not quite every case, from bringing the suit elsewhere than at the place where the cause of action arose."
>
> *Lancaster, Rec. R. R.*, v. *Mrs. Dunn, Admr.*, 153 La. 15, 95 So. 385.

This unanswerable interpretation of this act of Congress was cited, approved and followed by Judge Underwood in *C. & O. R. Co.* v. *Vigor, Admr.*, 17 Fed. Supp. 602, affirmed 90 F. 2d 7, c. d. 302 U. S. 705. In Eighth Circuit, *Schendel* v. *McGee, D. J.*, 300 Fed. 273, the federal court construed the act:

> "We assume Congress could provide that actions in the federal courts should be brought *at places where the same would not constitute a burden on*

commerce, but Congress *has not done so. It has given the right* under the Federal Employers' Liability Act, hereinbefore discussed, to an injured party, or in case of his death to the duly constituted representative, *to maintain* an action for damages *in the courts of the district where the defendant is doing business at the time the suit is commenced.* We are not concerned with the *justice*, or the *wisdom* of such legislation. It being the law, it is the court's duty, where there is jurisdiction, to take and retain that jurisdiction and try the case."

Cf. *So. R. R. Co.* v. *Cochran, Judge*, 56 F. 2d 1019.

To the same effect are also the following cases:

Norris v. *Illinois Central R. Co.*, 18 F. 2d 584 (D. C. Minn.).

Trapp v. *B. & O. R. R. Co.*, 283 F. (655) (D. C. Ohio).

Connelly v. *Central R. Co. of New Jersey*, 238 Fed. 932 (D. C. New York).

In the Trapp case, Judge Westenhaver investigated and discussed the *intention of Congress as set forth in the congressional record*, as did Mr. Justice Stanley Reed in the case of *U. S. A., Interstate Commerce Commission and Others* v. *American Truck Association*, 310 U. S. 534, 84 L. Ed. 1345.

The Supreme Court of Iowa in the case of *Payne, Agent*, v. *Knapp*, 197 Iowa 737, 198 N. W. 62, overruling its former two decisions, *Spoor* v. *Chicago, Rock Island and Pacific Co.*, 191 Iowa 1134, 183 N. W. 580, and *Wabash R. Co.* v. *Peterson*, 187 Iowa 1331, 175 N. W. 533, said:

"But in view of *the holding that the act of Congress confers a right that cannot be taken away by state legislation* upon a claimant to bring an action under the Federal Employers' Liability Act in any federal court designated by the act, and also gives concurrent jurisdiction to any state court of competent jurisdiction, it must follow *that the latter right is also one that the state cannot by legislation*

impair. In other words, since the act confers concurrent jurisdiction of actions brought under it upon certain designated federal courts, and also upon certain state courts of competent jurisdiction, the right being given by federal statute, to resort to the latter must be as immune from state prohibition as is the right to enter the former. See *Spokane & I. E. R. Co.* v. *Campbell*, 241 U. S. 497, 35 S. Ct. 683, 60 L. Ed. 1125; *Erie R. R. Co.* v. *Winfield*, 244 U. S. 170, 37 S. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662.

"With respect to a right arising under the Constitution or laws of the United States the *decision of the courts of the United States is controlling upon the state court*" (citing numerous cases).

The same was held by the courts of Minnesota, *State ex rel. Schendel* v. *District Court*, 156 Minn. 380, 194 N. W. 780, and the latter case *Peterson* v. *Ry.*, 244 N. W. 823, and the Supreme Court of Illinois, *Taylor* v. *So. Ry. Co.*, 350 Ill. 139, 182 N. E. 805, reached the same conclusion, but the appellate courts of Tennessee state a different rule of law and reach a different conclusion than did the courts of Iowa, Minnesota and Illinois. Tennessee appellate courts have misinterpretated and misconstrued this federal right, growing out of this federal act of Congress which creates liability and venue jurisdiction.

But we need not pursue this question further in this Miles case because it is not an *open question* as both the Supreme Court of Missouri and the Supreme Court of the United States have settled the question as to the *state courts of Missouri*. *Hoffman* v. *Mo ex rel.*, 309 Mo. 625, and 274 U. S. 44, and the matter is *stare decisis*.

Especially is the matter not debatable, since *McKnett* v. *St. L. & S. F. R. Co.*, 292 U. S. 230, 78 L. Ed. 726, which reversed the Supreme Court of Alabama which closed its doors to McKnett, who was injured in Tennessee, but who sought to enforce a federal right in the Alabama courts, in which the court said:

"The Federal Constitution prohibits state courts of general jurisdiction from refusing to do so solely because the suit is brought under a federal law. The denial of jurisdiction by the Alabama court is based solely upon the source of law sought to be enforced. The plaintiff is cast out because he is suing to enforce a federal act. A state may not discriminate against rights arising under federal law."

Congress Constitutionally and Lawfully Created This Federal Right—Liability, and Created the Venue Jurisdictional Statute.

Congress said that a suit could be brought and maintained in either state or federal court of the several states and could not be removed from a state court chosen by plaintiff to a federal court in that district.

Therefore under this *express*, not implied, language, this venue jurisdictional statute gave this absolute right to the injured employee or his administrator—the right to sue in any state court where the defendant was found doing business, and the removal statute, in these federal employers' liability cases, was, thereby, *expressly amended*. This was expressly held in *Teel* v. *C. & O. Ry. Co.*, 204 Fed. 918, 47 L. R. A. (N. S.) 21; *St. Joseph & G. I. R. R.* v. *Moore*, 243 U. S. 211; and *Moore* v. *C. & O. R. Co.*, 291 U. S. 205. To quote the language of what the Supreme Court of Illinois held:

"The cause of action is statutory liability there but under that act *jurisdiction is specifically given* to certain federal courts and the venue in such courts limited. Yet an existent concurrent jurisdiction in the state courts is recognized and jurisdiction is *not given by the act to any specified state courts* or the *venue in such state courts limited thereby.*"

Taylor v. *So. R. R. Co.*, 350 Ill. 139, 182 N. E. 805.

The language of the act creating this right, liability and remedy might well have been so worded as to place the jurisdictional venue rights in the state

where the cause of action arose. But it did not so state, but expressly says that the jurisdiction of the federal courts under this act:

> "Shall be concurrent with that of the courts of *the several states.*"

Therefore the words "The courts of *the several states,*" was put with a purpose of placing the state courts of competent general jurisdiction, not probate courts nor equity courts, nor bankruptcy courts, but courts of *common law* and *general jurisdiction* upon the same equal foundation and duty to try these Federal Employers' Liability Act cases as the federal courts. And if the right and remedy is legitimate in the federal court it can not be illegitimate in state courts because they came from the same womb of creation. And if the cause of action cannot be enjoined in the federal court, it is trying to make a distinction without a difference to say that it can be enjoined if brought and maintained in a state court with this express provisional act of Congress. That great Chief Justice Marshall, in the epoch history making case of *McCullough* v. *Maryland,* 4 Wheat. 316, 4 L. Ed. 579, said:

> "The power to create, implies the power to preserve."
>
> c. & d., *U. S., Interstate Commerce Commission, and Intervenor, Fair Labor Hour Wage and Hour Admr.,* v. *American Trucking Ass.,* 310 U. S. 534, 84 L. Ed. 1345.

But no implication is necessary in these cases because we have the positive and express language saying that the venue jurisdiction may be exercised in the courts of "*the several states,*" where, "the defendant is found doing business."

The State of Tennessee and its courts could not have created this liability as that belongs solely and alone to the Federal Government under its Constitution. The effort to enjoin such suits has no foundation in sound law

and logic because the legislature, one arm of the state, would be powerless to destroy this federal right, and the courts of a state could no more destroy this federal right than could the other arm of government, the legislative.

In the case of *A., T. & S. F. R. Co.* v. *Sowers,* (March 1, 1909) 213 U. S. 55, 70, 53 L. Ed. 695, 702, 29 S. Ct. 397, it was held that the State of New Mexico by legislative act created liability but could not, under the Constitution, *confine that created right to the state courts of New Mexico.* This was early determined by this court in *Dennick* v. *Central R. R. Co.,* 103 U. S. 111, 26 L. Ed. 439, where the courts said:

> "It would be a dangerous doctrine to establish that in all cases where the several states have substituted the statute for the common law, the liability can be enforced in no other state but that where the *statute was enacted* and the *transaction occurred.*"

This was evidently recognized by Congress composed mostly of lawyers because the Sowers case was determined more than a year before the Federal Employers' Act of April 6, 1910.

A subsequent case in 1914 of Tennessee, *C. I. R. R. Co.* v. *George,* 233 U. S. 354, 58 L. Ed. 997, where Alabama created liability but statute tried to confine the remedy solely and exclusively to the courts of that state and for the same reasons, the Supreme Court rejected this statutory confinement of the cause of action of the state courts as this was unconstitutional and void.

Therefore, the legislative branch of government that created these rights and remedy, in a state, cannot confine it to the state courts. We say that a court of equity is neither concerned with and has not power to confine the cause of action to the state courts where it arose and enjoin the prosecution of that cause of action in another state where the defendant is found doing business, as in this case, a million and a half dollars' worth of business in St. Louis, Missouri.

Equity Must Follow the Law and Cannot Strike Down and Destroy Statutory Enactments.

If this could be done, no act of the legislature and no act of Congress would be safe or valid. If courts of equity, exercising what the Tennessee courts say—"an inherent right of equity," could mould their idea as to what the law ought to be or is, in place and stead of the legislative branch of government, it would not only be in conflict with the legislative act but the *state militia* would conflict with the *marshals* of the court of appeals and the Supreme Court trying to enforce the law as each department saw it. The Supreme Courts and lower federal courts have settled this question many years ago as follows:

> "Whenever the rights or situation of parties are chiefly defined and established by law, *equity has no power* to change or unsettle those rights or that situation but in all such instances the maxim *aequitas sequitur legem* (equity follows the law) is strictly applicable" (102 Fed. 420).
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> *Gamewell and Long Telephone Co.* v. *City of New York*, 102 Fed. 420, 42 C. C. A. 405.
> *Aldrich* v. *Campbell*, 97 Fed. 660, 38 C. C. A. 847.
> *Maginac* v. *Thompson*, 15 How. 281, 14 L. Ed. 696.
> *Reece* v. *Watertown*, 19 Wall. 107, 22 L. Ed. 72.
> *Hedges* v. *Dixon Co.*, 150 U. S. 182, 14 S. Ct. 71, 37 L. Ed. 1044.

This question, "equity will follow the law" and will not overrule or destroy or repeal the laws, was announced as sound in this state in *Gilliam* v. *Tisdale*, 1 Yerg. 288, and in *Henderson* v. *Overton*, 2 Yerg. 394, and settled this as law more than one hundred years ago, but this applicable law was not applied by the Supreme Court and Court of Appeals of Tennessee and said courts failed or refused to apply to Mrs. Miles, in this case, the *sound applicable law*, but they did apply *inapplicable law*.

No Substantial, Material Grounds Are Alleged in the Bill for an Injunction or Sustained by the Evidence for an Injunction That Warrant the Granting and Maintaining of an Injunction Against This Federal Right.

The Eighth Circuit Court of Appeals and the Supreme Court of Iowa, where a state statute or the public policy of the state attempted to confine causes of action, arising in that state, to the state courts of that state, said:

> "The Iowa public policy can not destroy this federal right. In a conflict between such policy and a federal right given to a citizen of Iowa the public policy must yield. The constitution and the laws made thereunder are the supreme law of the land and are as much the law of the state as they are of the state enactments" (see Art. VI, U. S. Const.). 292 Fed. 326.
>
> 197 Iowa 737, 198 N. W. 62, overruling its former three decisions sustaining injunctions.

In this Miles case, "the jugular vein" or "the hub of the case" in pleading is well stated by the Supreme Court of Tennessee quoting from the bill in *I. C. R. Co.* v. *Miles*, 174 Tenn. 676, as follows:

> "It was further alleged that a defense of the suit brought by the administratrix as aforesaid would necessitate the transportation of many witnesses from Memphis to St. Louis, that numbers of these witnesses were employees of complainant railroad company, that it could not compel the attendance of necessary witnesses at a trial in St. Louis, and that the transportation of its employees to testify at St. Louis would disrupt its service, and that a trial of this case at St. Louis would put the complainant to great inconvenience and expense and would be an undue burden on interstate commerce."

This same pleading and contention was made in *Dimmit Hoffman* v. *Mo. ex rel. Foraker, Admr.*, 309 Mo. 625, 274 U. S. 20, and such contention touched the

trial judge, and he dismissed the Foraker lawsuit in Missouri. But the Supreme Court of Missouri and the Supreme Court of the United States reversed Judge Hoffman, and though it was expensive the defendant claimed it would be deprived of eleven of its valuable witnesses' testimony and it would be a great burden on interstate commerce and would be inconvenient and inequitable to let the suit be prosecuted by both the Supreme Court of Missouri and the Supreme Court of the United States, said this was not sufficient grounds and reversed the trial court.

The railroads have been dissatisfied with this act of Congress ever since it was passed and they have shown their dissatisfaction by every contention that could be made in lawsuits to prevent the effectiveness of this act of Congress to injured litigants.

In the case of *So. R. R.* v. *Cochran*, (1932) 56 F. 2d 1019, it was charged, to defend the case 417 miles from where the injury took place, that it would require over $2,000 as expenses, and that this expense money coudl not be recovered from the injured employee; and that it had *fifteen* witnesses whose oral testimony was absolutely necessary; and that it took *twenty-seven hours to travel* from Spartanburg, South Carolina, to Catlettsburg, Kentucky; and that the absence from the place of their employment of these witnesses would place a burden upon railroads; and cause undue interference with interstate commerce; and also deprive it of its rights under the fourteenth amendment, and the court answered:

> "It must be borne in mind that Congress has the power to regulate interstate commerce. The states have no such power. If the effect of a federal statute conferring jurisdiction upon a federal court is to place a burden upon interstate commerce, the power for that purpose exists, and the remedy is legislative and not judicial. The precise question here presented was considered by the Circuit Court

of Appeals for the Eighth Circuit in *Schendel* v. *McGee, District Judge,* 300 Fed. 273, 278. It was there said:

> 'We assume Congress could provide that actions in the federal courts should be at places where the same would not constitute a burden on commerce, but Congress has not done so. It has given the right under the Federal Employers' Liability Act, hereinbefore discussed, to an injured party, or in case of his death to the duly constituted representative, to maintain an action for damages in the courts of the district where the defendant is doing business at the time the suit is commenced. We are not concerned with the justice or the wisdom of such legislation. It being the law, it is the court's duty, where there is jurisdiction, to take and retain that jurisdiction and try the case.'

To the same effect are also *Norris* v. *Illinois Central R. Co.,* 18 F. 2d 584 (D. C. Minn.); *Trapp* v. *B. & O. R. R. Co.,* 283 Fed. 655 (D. C. Ohio); *Connelly* v. *Central R. Co. of New Jersey,* 238 Fed. 932 (D. C. New York).

(3, 4) Concluding that jurisdiction to try the case exists, has the defendant any discretion to refuse to exercise it? We think not. The existence of jurisdiction, when otherwise adequate to the occasion, created an implication to exercise it. *Second Employers' Liability Cases,* 223 U. S. 1, 32 S. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44."

In 1937, *C. & O. R. Co.* v. *Vigor, Admr.,* 90 F. 2d 7, c. d. 302 U. S. 705, 58 S. Ct. 26, 82 L. Ed. 545, the same averments were made in the bill as were made in this Miles case, yet the court answered:

> "The plaintiff, it is true, may suffer some inconvenience or be put to extra expense in producing witnesses to testify in court in the Indiana case, but it is to be presumed that Congress considered such probable inconvenience and expense in placing jurisdiction of the action in any district in which the defendant should be doing business at the time. We

held in *Southern Railway Company* v. *Cochran*, 56 F. 2d 1018, that the filing of a suit in such a jurisdiction, even though it was inconvenient to the defendant, was not enough to justify a court of equity in enjoining its prosecution in the face of the statute giving the right to bring the action in that jurisdiction."

Three times the same question as raised in the Miles case has been presented to the Supreme Court of the United States because of inconvenience, expenses and witnesses, and, etc., and the court has said:

> "As a practical matter, courts could not undertake to ascertain in advance of trial the number and importance of probable witnesses within and without the state and retain or refuse jurisdiction according to the relative inconvenience of the parties. *Denver & R. G. W. R. Co.* v. *Terte, supra*, 284 U. S. 287, 76 L. Ed. 297, 52 S. Ct. 485. *Hoffman* v. *Mo.*, 274 U. S. 21, 71 L. Ed. 907." 78 L. Ed. 1402, 292 U. S. 511.
>
> *National Milling Co.* v. *Columbia Milling Co.*, 292 U. S. 511, 54 S. Ct. 797, 78 L. Ed. 1396.

In the *National Milling Co. Case, supra*, the court further answered in the scholarly and terse language of Mr. Justice Cardozo:

> "Such a suit may be a burden, but oppressive and unreasonable, it is not."

In *Chicago, M. & St. P. Ry. Co.* v. *Schendel*, 8 Cir., 292 Fed. 326, 334, the court said:

> "The mere hardship of defending a suit brought elsewhere than in the district where plaintiff or witnesses reside is hardly sufficient to warrant the interference of equity. If so, jurisdiction given by Congress could be limited in practically every case."
>
> Cf. *So. Ry. Co.* v. *Painter, Admr.*, 117 F. 2d 106.

It would, indeed, create an anomalous situation in the law, if the courts of Missouri, which have general

jurisdiction and perfect jurisdiction to try these federal employers' liability action cases and its duty is mandatory under the act of Congress and the constitutional provisions (see *Hoffman* v. *Foraker*, 274 U. S. 21, 309 Mo. 625, as settled in Missouri, and a *stare decisis* proposition), the Tennessee courts, as they have done, can prevent that court from exercising effective jurisdiction. If this can be done, and is permitted in this case to stand as the law, then, indeed, the jurisdiction given by Congress can be limited or destroyed by any state court which sets itself up to be czar or dictator to the people of the United States on interstate commerce transactions and Art. I, Sec. 8, Subsec. 19, and Art. VI of U. S. Const., are rendered ineffective, and "a mere scrap of paper."

In the case of *Rader* v. *B. & O. R. R. Co.*, 108 F. 2d 980, c. d. April 1, 1940, 309 U. S. 682, the same averments were made for an injunction that have been made in this Miles case, and the injunction suit filed in the Ohio state court at the instance of the *B. & O. R. Co.* v. *Rader*, was made perpetual on January 25, 1939, yet the federal courts, Northern District of Illinois, treated this injunction suit as absolutely *without power and void*, and the Eighth Circuit Court and the Supreme Court affirmed that action and held that such injunction suit was not protected by Art. IV, Sec. 1, of the U. S. Const., which requires full faith and credit be given to the various state courts' records.

In *Taylor* v. *A., T. & S. F. R. Co.*, 292 Ill. App. 457, 11 N. E 2d 610, c. d. 58 S. Ct. 842, 82 L. Ed. 528, where Taylor recovered a judgment of $50,800 in the state courts of Illinois, under Federal Employers' Liability Act, and the injunction in the state court of Kansas from prosecuting his suit in Illinois was made final and perpetual, yet the courts of Illinois and the Supreme Court of the United States, by denying certiorari, held that *the injunction suit was not entitled to full faith and credit,*

otherwise the Kansas suit would have annulled and rendered this federal right granted under this federal statute constitutionally enacted, ineffective, limited and in fact, destroyed.

Tennessee courts' injunction in this Miles case is bound to be void for want of power because the Tennessee courts could not have the power to take away a federal right granted by Congress, but that is just what these Tennessee appellate courts have done with the most brilliant man on the bench, Mr. Justice De Haven dissenting.

And in the *B. & O. R. R. Co.* v. *Kepner*, 137 O. St. 409, c. d. April 14, 1941, 85 L. Ed. 750, the railroad claimed that to defend the case where it was brought would cost $4,000 (and this would double what the railroad alleged in the Cochran case). And it claimed that in its bill that it had over *twenty-five witnesses* that had to travel over *700 miles;* that it would have to take *numerous physicians, surgeons, radiologists,* and *hospital attendants,* and others, who gave Kepner medical aid, and numerous other railroad witnesses, who had inspected the premises at the said accident. In other words, these great railroad lawyers who have been dissatisfied with the Federal Employers' Act for the last thirty years have just picked from one case to another, and in the Kepner case they had picked its ideal case to raise the questions (see record and cause 678, October Term, 1940, p. 3 of the record). Yet the Supreme Court of Ohio and the Supreme Court of the United States held that it would not be equitable to not follow the law, or legislate away, by equitable process, that which Congress had enacted under its constitutional authority.

The *Vigor Case, supra,* was determined upon the bill and answer and full proof, the same as the Miles case. And if it would not be inequitable or if equity has to follow the law, and not destroy the law, then, indeed Tennessee appellate courts have committed monumental error by

setting up their idea as to what would be right and just in preference to what Congress, exercising its constitutional authority, has granted. Thus the Tennessee appellate courts have under what they call "inherent equity jurisdiction," sliced off, pared down, uprooted, and destroyed this federal right given Mrs. Miles by the constitutional act of Congress.

Wise courts have said that the remedy is *legislative and not judicial* (see *Cochran Case* and *Vigor Case, supra*), but Tennessee courts conflict with this idea and say that they will not leave the railroads to their remedy before the legislative branch of United States Government, but they will step in and annul, destroy, and uproot and legislate away their superior jurisdiction—Congress.

Where federal rights are involved, the Supreme Court has many times said that it is not and will not be bound by state courts' characterization given, nor would the court be relieved from considering the real nature of the right and the effect of the state courts' decision upon this federal right.

Carpenter v. *Shaw*, 280 U. S. 363, S. Ct. 121, 74 L. Ed. 478, rev. 134 Okla. 29.

Stratton v. *St. L. & S. W. R. Co.*, 284 U. S. 530, 52 S. Ct. 222, 76 L. Ed. 465.

Kloeb v. *Armour & Co.*, (Dec. 9, 1940) 85 L. Ed. 156.

When a federal question is present in the case appealed from state courts, as well as nonfederal questions, the Federal Supreme Court must determine whether nonfederal grounds independently support judgment of the state court. *Banks* v. *Weaver*, 51 S. Ct. 252, 282 U. S. 765, 75 L. Ed. 690, affg. 119 Neb. 153.

If Tennessee courts could apply their idea of equity to this federal right growing out of this federal statute and say that it was a nonfederal ground, then indeed the Supreme Court of the United States would be sheared of its usefulness on federal questions and federal rights in the United States.

Passing on a federal right, the Supreme Court regards that action of the state court must be tested by the operation and effect of the state courts' opinion and decree. *Near* v. *State of Minn.*, 283 U. S. 697, 51 S. Ct. 25, 75 L. Ed. 1357, rev. 179 Minn. 40.

If the effect of the Tennessee appellate courts in enjoining this suit filed in the state courts of Missouri is sustained then, indeed, the two years' statute of limitations for such suits under the Federal Employers' Liability Act (45 U. S. C. A. 56), applies to a new suit, as Paul H. Miles died June 5, 1938. Thus a greater injury will be inflicted upon Mrs. Miles by granting the injunction by the Tennessee appellate courts than to the railroad company by denying it as expressly held, in *Louf* v. *E. G. Skinner*, 303 U. S. 323, 58 S. Ct. 578, 82 L. Ed. 872. And if, in fact, the amended limitation statute of the same act which has been passed *since Mr. Miles's death* could be applied in Mrs. Miles's favor, still the three years' statutory limitations would expire June 4, 1941, and by the operation and effect of the Tennessee appellate courts' decision a new suit would be barred, and Mrs. Miles's rights would be destroyed. In *Norris* v. *State of Ala.*, 55 S. Ct. 579, 294 U. S. 587, 79 L. Ed. 1074, rev. 229 Ala. 226, this court held that where federal rights are involved in a state court, this court must inquire whether the right was denied by express terms or substantially so in effect and result, and if necessary, the evidence in the record must be examined.

There is no contradictory evidence in this Miles record, no witnesses contradicted anything to which any other witness has testified. Therefore, the record comes to this court not upon a contradictory fact question, but, in fact, a question of law solely. See the case of *Great Northern R. Co.* v. *State of Washington*, 300 U. S. 154, 57 S. Ct. 397, 81 L. Ed. 573, rev. 184 Wash. 710; and *Consolidated Textile Corp.* v. *Gregory*, 289 U. S. 85, 53 S. Ct. 529, 77 L. Ed. 1047, rev. 209 Wis. 476.

It was held that the Supreme Court must ascertain for itself the facts disclosed by the record, and whether a federal right has been denied by state courts. The Supreme Court is not concluded by a finding of fact and law by the state court, but must examine the evidence to ascertain whether it supports state courts' decision or not against this claim of federal rights.

United Gas Public Service Corp. v. *State of Texas*, 303 U. S. 123, 58 S. Ct. 483, 82 L. Ed. 702.

And in *North Carolina R. Co.* v. *Zachary*, 232 U. S. 248, 34 S. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159, it was expressly held that where a federal question was raised before the trial court, Supreme Court has jurisdiction to and will review the judgment of state courts. Chancellor Bejach sustained these federal questions and the Tennessee appellate courts overruled them, in this Miles case.

Summary of State Decisions Granting or Denying Injunctions for the Last Thirty Years.

It has already been called to Your Honors' attention in the petition for certiorari that every federal court that has decided the question as to whether or not an injunction could or should be maintained against this federal right of bringing and maintaining a lawsuit in a district other than where the cause of action accrues have uniformly held that such injunction can not be maintained. In *B. & O. R. R. Co.* v. *Bole*, 31 Fed. Supp. 221, Judge Baker, who was furnished no brief except by the railroad, held that *an injunction could be maintained* but on January 15, 1941, in the case of *B. & O. R. R. Co.* v. *Jesse C. Clemm and Henry G. Shores*, overruled his opinion in the Bole case, and refused to follow the *Crandall Case*, 53 F. 2d 969, and he followed the Vigor case (see 36 or 37 Fed. Supp.), not yet printed.

The first case sustaining an injunction was December 10, 1918, *Reed, Admr.*, v. *I. C. R. R. Co.*, 182 Ky. 155, but

the court in this case did not consider the case of *Connelly* v. *Central R. R. Co.*, 238 Fed. 652, which was decided two years before that.

No doubt but what the Kentucky court would follow the *Cochran* and *Vigor Cases*, 56 F. 2d, and 90 F. 2d. The *Spoor Case*, 191 Iowa 1134, *Peterson Case*, 187 Iowa 1331, and *Payne, Agent*, v. *Knapp*, 195 N. W., were expressly overruled in 197 Iowa 797, citing and following the *Schendel Case*, 292 Fed. 326. In the *Nortini Case*, 334 Mo., decided in 1932, the court said:

> "The respondent has not favored us with either brief or argument."

Then the court proceeded to erroneously follow the railroad company's brief like Judge Baker did in the *Bole Case*, 31 Fed. Supp.

It does not appear that Missouri courts considered the *Schendel Case*, 292 Fed. 326, nor the subsequent case, 300 Fed. 273. No doubt the Missouri court would do like the Iowa court, and the Minnesota court, 165 Minn. 380, and 244 N. W. 823, and would follow the federal court's construction of this federal statute. The *McGinnley Case*, 175 Wis., a seven-judge court, and the *Ball Case*, 126 Kan., a seven-judge court, and the *Dunn Case*, 156 La., a seven-judge court; all three of these state courts *not then being given the benefit of the federal courts' construction* and interpretation *refused injunctions* and also refused to follow the Reed case from Kentucky. In *Railroad* v. *Baum*, 39 N. Mex. 22, the state court refused an injunction. The early Indiana case, *Kern* v. *Railroad*, 204 Ind. 595, did not cite and discuss the federal cases construing and interpreting this act of Congress and it overlooked the *Hoffman Case*, 274 U. S., and in the last case of *McConnelly* v. *Thomson, Trustee of Railroad*, 213 Ind. 16, *denying an injunction*, and said:

> "Such action, if effective, destroys a federal right of the litigant and obstructs the performance of a

> duty imposed by act of Congress upon a District Court of the United States. This is beyond the power of a state court."

The chief justice, who rendered this opinion, was on the Seventh Circuit Court of Appeals and took part in the decision of *Rader* v. *B. & O. R. Co.*, 108 F. 2d 980, c. d. 309 U. S. 682, which refused to give full faith and credit *to an injunction suit* because *it would destroy the federal rights granted by this act of Congress*, to say that a suit filed in accordance with said act the prosecution could be enjoined. The filing of such a suit in a state court could not be enjoined when the same mandatory duty was placed by the act of Congress, upon *the state court of Missouri* as expressly held in the *Hoffman Case*, 309 Mo. and 274 U. S., and expressly held the duty of a *state court of Connecticut* in *Second Employers' Liability Case*, 223 U. S. 1, and which has later been held, in the *McKnett Case*, 292 U. S., reversing 227 Ala. 349, which state courts closed their doors to McKnett, a citizen who lived in Tennessee, and who was injured in Tennessee, and brought his suit in Alabama state courts.

State courts have just *misconstrued this mandatory duty upon state courts* to hear and determine cases under the Federal Employers' Liability Act, *if they have general jurisdiction*. Of course, probate courts, equity courts, and any other special courts with special jurisdiction, could have *no such duty to perform but law courts of general jurisdiction must* entertain and try such cases. The Minnesota court, 156 Minn. 380, said:

> "Under the doctrine of the Second Employers' Liability cases, the state court must exercise its jurisdiction, if adequate to the occasion when a suitor comes to it. It is not a matter of its pleasure. It may not want his case. It may think the burden of trying it and the attendant expenses should be borne in another state; but there is a right in the suitor and a corresponding duty in the court, so the Supreme Court said:"

In the case of *Railroad* v. *Matzinger*, 136 O. St. 271, an injunction was sustained, but in the later case, *B. & O. R., Co.* v. *Kepner*, 137 Ohio, c. d. April 14, 1941, the *injunction was denied to the railroad company against* Kepner, prosecuting his suit in New York, 700 miles away from where the cause of action arose. It will be noted in this federal act, 45 U. S. C. A. 56, that Congress expressly provided:

> "And no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

This was not only a repealing act, repealing the federal removal statute as to cases arising under this Federal Employers' Liability Act, but it also *expressly and mandatorily fixed jurisdiction in the state courts* that had *general jurisdiction*, and there cannot be any escape from this *mandatory duty*, under the *Second Employers' Liability Case*, 223 U. S. 1, the *Hoffman Case*, 274 U. S. 21, and the *McKnett Case*, 292 U. S. 230.

Liability and the *remedy* were created by the *same act* and the remedy is created to be enforced in either federal court or state court and it has been held:

> "Where the provision for liability is coupled with a provision for a specific remedy, that remedy and that alone must be employed."
>
> *Pollard* v. *Bailey*, 87 U. S. 520, 22 L. Ed. 376.
>
> *Stewart, Admr.*, v. *B. & O. R. Co.*, 168 U. S. 445.

In the last case it was said:

> "An action to recover damages for a tort is not local but transitory and can, as a general rule, be maintained wherever the wrongdoer can be found. *Demick* v. *Central R. Co.*, 103 U. S. 11, 26 L. Ed. 439."

Now, when Congress provided, as it had a right to do, that when an injured employee chose to bring his suit in a state court under the Federal Employers' Lia-

bility Act, *no power* existed to remove that case to federal court. In *McCullough v. Maryland*, 4 Wheat. 316, Mr. Chief Justice Marshall said:

> "The power to create implies the power to preserve."

Evidently Congress *intended to preserve this litigant's right* to not only bring but maintain his lawsuit in a state court, if he so chose such court, because the *act forbid* the railroad from *removing the cause to a federal court.* Unquestionably, it was the intention of Congress, by the express language used in the act, to give the injured employee or his administrator the choice of the federal courts or the state courts; and if he chose a state court, no court had a right to take this from him.

In the very recent case *Breisch* v. *Central R. R. Co., of New Jersey*, No. 384, October Term, 1940, decided by this court March 3, 1941, it is said:

> "The Federal Employers' Liability Act does give a right of action and *fixes the tribunal where it may be enforced. Moore* v. *C. & O. R. Co.*, 291 U. S. 205, Secs. 1 and 6, 45 U. S. C. A., 51, 56."

Conclusion.

Tennessee appellate courts have taken this "privilege" and "federal right" from Mrs. Miles, *to whom it was given* by the Act of Congress, and *have given it to the railroad*, in favor of whom the *"privilege"* or *federal right* was *not* granted; and we beg to quote Judge Underwoods' language:

> "Taking a privilege from one upon whom it is conferred by statute, and giving it to the opposite party against whom that specific privilege was granted."
>
> *C. & O.* v. *Vigor*, 17 Fed. Supp. 602, aff. 90 F. 2d 7, c. d. 302 U. S. 705.

In *C., M. & St. P. R. Co.* v. *Schendel, Admr.*, 292 Fed. 326, 339, the language of Justice Kenyon is appropriate:

> "If a state can compel a citizen to give up one federal right as a prerequisite to bringing suit in a federal court, it can compel him to give up all federal rights. It is a proposition fraught with amazing consequences."

As the act gives the same jurisdiction to the state court that it does to the federal court, to the injured employee or his personal representative, and provides that if the state court is chosen, the cause shall not be removed to a federal court; and if the Tennessee appellate courts can take this federal right granted by Congress, over which the State of Tennessee and its courts have no jurisdiction, over a matter involved in interstate commerce and beyond the power of states or state courts to legislate; then we are faced with the amazing consequences that *any rights given by Congress can be taken away by the state courts of Tennessee*, and notwithstanding U. S. Const., Art. VI, to contrary.

Both the *right* and the *remedy* provided by Congress comes from the *same womb of creation*, and one could not be lawful and the other unlawful; one could not be equitable (as all the federal courts have held), and the other could not be inequitable, as Tennessee courts have held. And regardless of the interpretations or constructions that Tennessee courts, Indiana courts, Ohio courts, and Kentucky courts may place upon this federal statute not created by their legislature, but created beyond their powers; and these state courts' interpretations and constructions of this federal statute must fall if they comply with or apply the federal courts' constructions and interpretations of this federal statute.

Since the cases, *Atchison, T. & S. F. Ry. Co.* v. *Sowers*, 213 U. S. 55, 29 S. Ct. 397, 53 L. Ed. 695 (one year *before* the Federal Employers' Liability Act was passed) and *Tennessee C. I. Ry. Co.* v. *George*, (1914) 233 U. S.

354, 58 L. Ed. 997, a state in its sovereign power can not create a right and confine that right to the courts of that state. The states have not the powers that the United States Constitution gives Congress, namely,

> "To make all laws which shall be necessary and proper for the carrying into execution the foregoing Powers."
>
> Art. I, Sec. 8, Subsec. 19.

And Art. VI,

> "and all the laws of the United States which shall be made in pursuance thereof, * * * shall be the Supreme law of the land, etc."

Is it possible that the so-called "inherent equitable powers of the state" are more supreme or are higher than the state itself, in the exercise of its full sovereign power?

Even if so, still, such equitable power can not supercede, annul, and destroy these federal rights given by constitutional authority.

The test and extent of equitable powers (where no federal statute was involved) were determined at the time that the Federal Employers' Liability Act became a law and were correctly stated by Chief Justice McClain:

> "But beyond the prevention of some *threatened evasion* of *some specific laws* of the *state intended to regulate the relations of its citizens to each other in some definite manner*, courts have been reluctant to interfere with the exercise of the undeniable right of a resident to go into the courts of another state to secure such relief as may there be available to him, and have not felt justified in scrutinizing his motive in doing so."
>
> *Jones* v. *Hughes*, 156 Iowa 684, 137 N. W. 1023, 42 L. R. A. (N. S.).

The Supreme Court of Louisiana stated the same test, in *R. R. Co.* v. *Dunn, Admr.*, 153 La. 15, 95 So. 385.

Tennessee court approved this test in Fox case but would not apply it in this Miles case.

Am. Ry. Co. v. *Fox*, 135 Tenn. 489, 87 S. W. 117, Ann Cas. 1918B, 1148.

Courts, either of law or equity, can not or never have, so far, justified an injunction on *motive* or *purpose* of the party in taking such legal action, as was lawful. *Railroad* v. *Vincent*, 116 Tenn. 317, collecting all state and federal decisions to 1905. And the Supreme Court has recently held:

> "But it is clear that the motive or purpose that actuated any or all of these parties in procuring a lawful and valid appointment (Mecom, as administrator) is immaterial."
>
> *Mecom, Admr.*, v. *Fitzsimmons Drilling Co. and Atlantic Oil Co.*, 284 U. S. 183, 52 S. Ct. 84, 76 L. Ed.

In Mrs. Miles's demurrer, as well as her answer and assignment of errors, the fourteenth amendment was invoked, that:

> "No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States * * * nor deny to any person within its jurisdiction the equal protection of the laws."

The Tennessee appellate courts, in this Miles case, have abridged the privileges or immunities Congress has granted Mrs. Miles, and these courts are an arm of the State of Tennessee, and their acts challenge and conflict with this constitutional provision.

And congressional power over "interstate commerce" is exclusive and plenary, and no state, whether Legislative, Executive or Judicial Department, has the power to destroy. If Tennessee courts can regulate Mrs. Miles's clear, specific, express and constitutional right created by the womb of Congress, and take from her what Congress has given to her, and give this right to the Illinois

Central Railroad Company, then the "privileges" and "Immunities" will soon become, in the picturesque language attributed to Abraham Lincoln, "as thin as the homeopathic soup made by boiling the shadow of a pigeon that had starved to death." John Ruskin wisely said:

"Pride is at the bottom of all great mistakes."

We fear that Tennessee appellate courts, like some other state courts, have been unable to lay aside that pride to take unto themselves supreme power over federal rights which is a federal question. Wm. Pitt well said:

"Where law ends, tyranny begins."

Mrs. Miles was made a widow on June 5th, 1938, when her means of support was taken from her by the death of her husband, yet she has been deprived and delayed of her federal rights, created by the womb of Congress, for three years by the Tennessee appellate courts. Gladstone truly said:

"Justice delayed is justice denied."

With the fullest measure of confidence in the ends that will be reached by Your Honors, we most respectfully submit client's rights in the foregoing petition and brief.

WILLIAM G. CAVETT,
Memphis, Tennessee,
Attorney for Mrs. Jesse Miles.

HAL S. BUCHANAN,
Memphis, Tennessee,
ROBERT A. HARRIS and
LOUIS E. MILLER,
St. Louis, Missouri,
Of Counsel.